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JEANNE HICKS, Clerk
Deputy
Heather Figueroa

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THOMAS B. LINDBERG

DIVISION #6

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STATE OF ARIZONA,)	Yavapai Superior
)	Court No.
)	CR2008-1339
Plaintiff,)	¹³⁰⁰
)	Oral Argument on
vs.)	Motion for Remand
)	
STEVEN CARROLL DEMOCKER,)	
)	
Defendant.)	
_____)	

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REPORTER'S TRANSCRIPT

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Prescott, Arizona January 16, 2009

Sandra K Markham, CR, RPR, CSR
Certified Reporter
Arizona License No. 50001

ORIGINAL

1 **APPEARANCE OF COUNSEL:**

2 For Plaintiff:
3 MARK AINLEY and JACK FIELDS,
4 Deputy County Attorneys,
5 Yavapai County Attorney's Office.

6 For Defendant:
7 JOHN SEARS,
8 Attorneys at Law.

9 LARRY A. HAMMOND
10 ANNE M. CHAPMAN,
11 Attorneys at Law.

1 THE COURT: This is CR20081339, State versus
2 Steven C. DeMocker. We are set for oral argument this
3 afternoon on the defendant's motion for new determination
4 of probable cause. Mr. --

5 A VOICE: Sorry.

6 THE COURT: Mr. Sears, Mr. Hammond, Ms. Chapman
7 are all here for the defendant, who is present in custody,
8 and Mr. Ainley is here on this issue I think.

9 MR. AINLEY: Judge, I thought you would want to
10 set the date for the argument concerning the public record
11 so that Mr. Fields can leave and then we can --

12 THE COURT: I do. And I will note Mr. Fields is
13 here on the other issue with regard to setting of a
14 hearing concerning the Court's review of matters that have
15 been sought to be released under the public record law by
16 third parties.

17 MR. FIELDS: Judge, while we're waiting for -- as
18 you consult your calendar.

19 THE COURT: Exactly.

20 MR. FIELDS: We may have -- we may have resolved
21 some of the issues that we had brought forward with regard
22 to the autopsy photos and some of the crime scene
23 photographs. I will confirm that with the Court in
24 writing if that is indeed the case, and hopefully narrow
25 the issues.

1 THE COURT: I would appreciate any narrowing that
2 I can have in that regard.

3 Mr. Sears, I think you and the other defense
4 counsel were intending to file some type of response.

5 MR. SEARS: We did, Judge, and I am encouraged
6 that the State may have resolved some of these issues with
7 the media, but I would like to be put in the discussion
8 with them to see if the resolution is one that seems
9 reasonable and appropriate to us before it's signed off on
10 and orders are cut.

11 THE COURT: Sure. I am sure Mr. Fields intended
12 that.

13 MR. FIELDS: Absolutely.

14 MR. SEARS: Thank you.

15 MR. FIELDS: There -- I will discuss it with
16 Mr. Sears later.

17 MR. SEARS: Thank you.

18 THE COURT: What are you thinking about in terms
19 of having a hearing date on this?

20 MR. SEARS: Well, Judge, we would like to file
21 something and because of the collective schedules of all
22 of us on this side, if there was any way we could go out
23 until, I don't have my calendar with me, but three weeks
24 from this week. Not next week, not the following week,
25 but the beginning of the week after that, that would give

1 us time to reassemble, take a look at it, and get our
2 response in time before commenting and --

3 THE COURT: So the week of February 2nd?

4 MR. SEARS: If that is three weeks out. I think
5 it, isn't it?

6 THE COURT: That would be the following week.

7 MR. SEARS: Thank you. Yes.

8 If we could delay the decision until then.
9 This is a very important issue for us and for the family.

10 THE COURT: I currently have two trials scheduled
11 for that week. Obviously only one can go, but Friday,
12 February 6th, so about three weeks from today, I expect
13 that any trial that is going will be to the jury. So the
14 afternoon would work for me probably. Friday,
15 February 6th I imagine just to make sure the jury is out
16 or something around 3 o'clock.

17 MR. SEARS: February 6th at 3:00?

18 THE COURT: That would work for me if you all are
19 available.

20 MR. FIELDS: I am available, your Honor. Thank
21 you.

22 THE COURT: All right. Then I'll set oral
23 argument -- work out those issues that you can work out
24 and see you back hear on that issue.

25 Thank you, Mr. Fields, for coming over on

1 that.

2 MR. FIELDS: Thank you.

3 THE COURT: February 6th. Friday, February 6,
4 2009, at 3:00 p.m.

5 With regard to the other issue, are you
6 prepared to proceed, Mr. Sears?

7 MR. SEARS: Yes, sir.

8 THE COURT: Mr. Ainley?

9 MR. AINLEY: Yes.

10 THE COURT: Who is arguing on behalf of the
11 defense?

12 MR. SEARS: That would be me.

13 THE COURT: Mr. Sears, you may proceed.

14 MR. SEARS: Thank you.

15 Your Honor, I would just tell you that over
16 time, I have always looked at Grand Jury remand motions
17 with a fair degree of scepticism and have tended only to
18 file them in that particular case where I thought, first,
19 the motion had some likelihood of being granted, but more
20 particularly that if granted, it might change the outcome
21 in the case rather than just sending the case back for an
22 almost automatic new finding of probable cause with a
23 couple of errors corrected.

24 But when I got the Grand Jury transcript in
25 this case, I knew when I put it down that we were going to

1 file this motion.

2 At the time we got it, the discovery was
3 just underway and we didn't have a -- anywhere near a full
4 picture of it, the evidence against Mr. DeMocker that we
5 did at the time, but I could tell from a reading of the
6 transcript and the way in which the case was presented,
7 the questions that the grand jurors had, the length of
8 time that the presentation took, the closeness of the vote
9 in the case, that this was -- this was going to be a case
10 in which this would become an issue for the Court to
11 decide.

12 And nothing that has happened since then has
13 caused me to change from that position. In fact, I think,
14 if anything, I feel more strongly about this issue than I
15 did when we began to write this motion.

16 This is an unusual procedural case in that
17 unlike many, many murders, many crimes of any nature,
18 there was a long gap between the occurrence and the arrest
19 of my client. There was a more typical period of time
20 between -- of course, governed by the rules between his
21 arrest and the Grand Jury presentation, but then there has
22 been a particularly long period of time between that Grand
23 Jury presentation and today.

24 And much has happened because of that
25 particular scenario that I think affects not only what

1 happened at the Grand Jury, but also what we think should
2 happen when the case goes back to the Grand Jury.

3 As we talked about yesterday in chambers,
4 one of the things that has become apparent to us is that
5 this is a case in which there is an active, aggressive and
6 ongoing investigation by the police, not only of the
7 evidence they have collected, but also of new allegations,
8 new evidence, new theories, new witnesses. We have gotten
9 discovery including a set of disclosures that were
10 delivered to me here Tuesday afternoon that make that
11 clear.

12 There were a round of subpoenas for
13 financial records, at least one of which was returnable
14 today. So it is obvious to us that this case is far from
15 over in terms of the investigation.

16 I think that is important because I want to
17 focus not only today on the presentation itself and the
18 reasons why we think remand is required under the law and
19 the cases, but also on how this remand should be treated,
20 because I don't think that it would be useful or
21 appropriate or even safe for this Court to consider
22 remanding this matter, but also considering at the same
23 time a detailed order that we would propose to the Court
24 that would give the State direction and requirements with
25 respect to the next presentation.

1 That would tell the State what evidence this
2 time around they would have to submit to the Grand Jury
3 under the case law and under your order and also to tell
4 the State what it might not do. The things that it had
5 done before or was likely to do that it would be precluded
6 from doing.

7 THE COURT: Is there some authority in the rules
8 for me to give that kind of a directive?

9 MR. SEARS: I think so. I think if you read 12.9
10 and you take into consideration the cases, particularly
11 Trebus, which admittedly was a case involving the typical
12 request by a defense lawyer to the State prior to the
13 initial presentation, you can come away with the idea that
14 the courts in Arizona would want to, for reasons of
15 judicial economy and for observance and protection of the
16 defendant's rights under the rules and under the
17 constitution, to be sure that the State was not confused
18 or uncertain about what it is that happened at the first
19 presentation that caused the remand and what ought to be
20 done to prevent a similar occurrence the next time the
21 case was presented.

22 So I couldn't find any cases in Arizona that
23 specifically authorize that precise proceeding, but my
24 sense is that when you read those cases together with the
25 rule, it would make -- it would not only make good sense,

1 it would probably be the logical thing to do in a case as
2 complicated as this where there are many issues that we
3 have identified that we think require correction, and
4 those include some of the issues that the State has
5 conceded in the testimony in the Simpson hearing through
6 Detective Brown and Detective McDormett needed correction
7 at the first proceeding.

8 So I think that we are on safe ground here
9 in terms of such a proceeding.

10 If the State objects and the Court is not
11 inclined to do that, then I can tell the Court what I
12 would do is if the Court remanded it, before the
13 presentation, we would send essentially a detailed Trebus
14 letter to the State with those same requests and it would
15 seem to me more appropriate to have it as part of a court
16 order because what we would be asking for would be those
17 things that we would expect the Court to find were either
18 lacking or needed to be included in the next presentation.

19 So one way or the other we think that it
20 ought to go and it seems to us to make good sense to have
21 it as part of one proceeding so that there would be no
22 mistake about what the Court wanted done the next time
23 around versus what the defendant wanted done the next time
24 around, so there wouldn't be a dispute about what the
25 source of that request was. If it comes from the Court,

1 every one understands it. If it comes from the defense,
2 it's likely to be a subject of contention.

3 THE COURT: All right.

4 MR. SEARS: Thank you.

5 THE COURT: Go ahead.

6 MR. SEARS: Thank you. All right. Let me just
7 quickly review the issues as we see them in this case.

8 The law is very clear that the base line
9 standard for Grand Jury presentation is that it be fair
10 and impartial. That's Crimmins and all the other cases
11 decided after that case.

12 We have outlined in our motion and then
13 again highlighted again in our reply those particular
14 areas in the presentation about which we take an
15 objection, and if I could run through them in more or less
16 in the order they were presented.

17 In this way, Judge, not to repeat what is in
18 my brief, but what I would like to do is bring them
19 forward because each of those arguments for the most part
20 involves a complaint we have about the way it was
21 presented at the time the Grand Jury considered this
22 evidence, but also because of what we learned in the
23 discovery in this case and actually in the court
24 proceedings in this case, in open court from the State and
25 its witnesses and from the comments of Mr. Ainley, we

1 think that evidence looks like today, because much of it
2 has changed, we would suggest most of it has changed to
3 the detriment of the State's case. But I would like to
4 sort of connect it altogether so that my objections are in
5 the context of what we think the evidence is on
6 January 16th.

7 The first thing I wanted to talk about is
8 what may be the most important evidence that we think the
9 State failed to present accurately and truthfully to the
10 Grand Jury and that is the evidence of the DNA under the
11 fingernail of Ms. Kennedy that was collected at autopsy
12 and analyzed by the two different laboratories and the
13 Court will recall that our original objection was that
14 this important exculpatory evidence which at the time of
15 the presentation was described as DNA, that we thought it
16 was described as DNA of an unidentified male, was coupled
17 with testimony from the detective that could be explained
18 entirely by the fingernail evidence. Of course that
19 detective has changed, in the Simpson proceeding, his
20 testimony, and concedes that he had misstated to the Grand
21 Jury what the state of those clippers were.

22 We have pointed out in our reply we don't
23 think his -- his correction goes far enough, because not
24 only did he misstate the evidence, we think the
25 discovery -- and we gave the Court a reference to the

1 Bates page in our discovery -- we think that the discovery
2 shows that he knew or should have known before he went to
3 the Grand Jury the first time that what he was saying was
4 incorrect. So it is more serious to us than simply a
5 misstatement of fact. We think that the State knew what
6 the evidence was and allowed the witness to make that
7 statement which was untrue at the time that it was made.

8 That also speaks to another issue which is
9 the role of the prosecutor in the Grand Jury. Those of us
10 that have practiced for a long time in Yavapai County have
11 an understanding of how the Yavapai County Grand Jury
12 works. Some of us from inside, some of us from outside
13 the door.

14 But regardless of how the Grand Jury
15 actually operates in Yavapai County, and regardless of how
16 much control the prosecutor making the presentation really
17 seems to have, the rules and the law around the rules
18 haven't changed. It may be a visionary rule that doesn't
19 apply in practice to the way Grand Jury presentations are
20 done in this county, but it is the rule nonetheless, and
21 the rule says, as I read it collectively and the cases,
22 that the prosecutor really works for the Grand Jury and
23 that the Grand Jury has a function. The prosecutor's
24 responsibility is to give the Grand Jury a fair and
25 impartial presentation of evidence and let the Grand Jury

1 do its work.

2 When the prosecutor improperly directs the
3 evidence, comments on the evidence, allows mistaken
4 evidence or false evidence to be presented, the prosecutor
5 has lost sight of his role in this case. It may be
6 understandable. It may be tempting. And it may be the
7 way it's done, but when you apply the way in which the
8 case was presented to the Grand Jury to the rules, it
9 seems pretty clear to us that there were a number of
10 instances which we have pointed out in our moving papers
11 where the prosecutor fell down in his responsibility.

12 And among those, among those areas of
13 concern for us was the -- were the instances in which the
14 prosecutor commented on the evidence and made -- made
15 statements that added to the testimony of the witness. It
16 may be conversational. It may be the way things are done.
17 But we think that is conduct that is way beyond the role
18 of the prosecutor if he or she are doing their job
19 properly.

20 In the DNA context, we think that the
21 evidence has moved forward now as we know from the
22 testimony of Detective Brown in the Simpson hearing to an
23 even more powerful piece of exculpatory evidence that we
24 think has to be presented to the Grand Jury which is now
25 after many, many lab tests on this same sample, they have

1 identified a full profile, all 14 loci of a DNA profile of
2 a person who is not Mr. DeMocker, not Mr. Knapp, not any
3 of the individuals who the State obtained buccal swabs for
4 exclusionary purposes. No one in the CODIS system, DNA
5 database, and is a person who is truly unknown. This is
6 not one that I think Detective Brown could reasonably
7 argue with me is anything other than an unknown
8 individual.

9 And as we said in our reply, the inference
10 to be drawn from that is a powerful one and clearly
11 exculpatory that there was a struggle with an unknown man
12 who is not the defendant in this case and if you had to
13 pick one place in the entire crime scene, one location in
14 the entire crime scene where that presence of that unknown
15 evidence is that would be relevant, it's under the
16 fingernails of the victim.

17 The telephone that she was speaking on. The
18 light bulbs. The door handle. All of the other places
19 that evidence was collected throughout the house are
20 important, but it seems to us incredibly important that
21 the DNA that matches no one in this case, particularly not
22 the defendant, but that is a full profile, a full profile,
23 not inconclusive. Not impartial. Not an inconclusive
24 match. This is somebody else that's there.

25 And the State has exhaustively gone out and

1 apparently continues within the last 30 days or so to try
2 and identify additional males, some of whom we're still
3 struggling to understand who they are in this case to find
4 additional males to take exclusionary swabs from to
5 compare to this sample and as far as we know from the
6 state of the evidence, they have had no luck.

7 So we think when the case goes back to the
8 Grand Jury, the Grand Jury must be told about this
9 development and must be told in a particular way that this
10 evidence has been done, has been collected. This is the
11 result of the analysis, and that all of this exclusionary
12 work was done and here are the results. We think that the
13 case law requires it.

14 We think that the definition of clearly
15 exculpatory evidence that comes from Trebus is a fairly
16 low standard. It talks about evidence that just might
17 deter the Grand Jury from finding probable cause. It's
18 hard for us to imagine how this powerful piece of evidence
19 would fail to be clearly exculpatory under the Trebus
20 standard. It is certainly evidence that would likely
21 impact the Grand Jury's determination of probable cause.

22 We are suggesting also that the DNA on the
23 phone, the DNA on the light bulbs, the biological evidence
24 and results of the reports from the DNA and the cellular
25 material on 805, on the door handle are all matters that

1 must be brought to the attention of the Grand Jury because
2 they also, as we said in our motion and in our reply, all
3 point away from the defendant and to the presence of an
4 unknown male.

5 It is complicating for the State that there
6 is no cross match, that the DNA profile under her
7 fingernails apparently at least does not match the unknown
8 male profile from the door handle. We don't know whether
9 they have asked for more tests to compare that unknown
10 profile against the other unknown profiles, but the point
11 remains the same. One or more unknown males left DNA
12 evidence in this house.

13 You might remember that over the course of
14 the Simpson hearing, Mr. Ainley and the State's witnesses
15 suggested that essentially there was no DNA evidence and
16 they went into this -- this discussion that layered day
17 after day, and first it was a suggestion, not supported by
18 anything in the record, that maybe Mr. DeMocker was
19 wearing gloves. Yesterday that escalated into he was
20 wearing gloves, overalls, carried a backpack, and burned
21 all of the incriminating evidence at some place.

22 This is very concerning to us, Judge,
23 because the pattern of substituting speculation like this
24 for actual evidence or lack of actual evidence clearly
25 began in the Grand Jury presentation when the State was

1 making presentations through witnesses who would say
2 things like this is a rage attack and rage always means
3 that there's a relationship between the victim and the
4 attackers, and the other utterly unsupported assertions
5 that were made that are not based on evidence or fact or
6 science that we pointed out in our moving papers.

7 But that process and the process by which
8 the State has been reduced to just guessing what might
9 happen when something pops up that interferes with their
10 theory is an issue that I think the Court needs to address
11 in this remand motion, because, unless the State is
12 clearly aware that is not a substitute for actual evidence
13 and that is not something that could be done that would
14 create a fair and impartial presentation, then perhaps we
15 won't would be doing this motion again in the future
16 perhaps.

17 So we would like to make it clear that we
18 are not only asking for a presentation of accurate and
19 complete evidence as it's known today or at the time the
20 case actually goes to the Grand Jury, if that is sometime
21 in the future, but that the State at the same time not
22 either explain away the problems that exculpatory evidence
23 causes for their case with speculation like overalls or
24 gloves or bonfires, but they restrict themselves and be
25 restricted by the order of this Court to an actual

1 presentation of actual evidence. Let the Grand Jury
2 decide whether that amounts to probable cause.

3 The evidence that wasn't mentioned as we
4 pointed out in our original motion that we think is also
5 clearly exculpatory and hugely important to this case is
6 evidence from other than at the crime scene. The State
7 limited its presentation to evidence collected at the
8 Bridal Path location, but didn't tell the Grand Jury that
9 the other half of the investigation consisted of evidence
10 from Mr. DeMocker's car, his bicycle, his shoes, his
11 clothing, his washing machine and the hoses, his
12 apartment, his office, his apartment in Scottsdale, his
13 office in Scottsdale, his computers, all of that evidence,
14 that biological and forensic evidence, was tested and
15 tested again and tested yet again and tested yet again
16 after that, and despite what Detective Brown would quibble
17 with, produced no laboratory report disclosed to the
18 defendant as of this date that identified the defendant as
19 the contributor of any of that biological evidence in
20 those locations.

21 And that makes sense if you remember
22 Mr. Ainley at the end of his presentation yesterday, tried
23 I thought in a very surprising way to link this case to
24 the OJ Simpson case, about which there is no comparison
25 and that is a matter for another day.

1 But let's give him the benefit of the doubt
2 and let's remember the OJ Simpson case for a minute and in
3 that case there was evidence of the defendant's presence
4 biologically at the crime scene, but there was also
5 evidence as the prosecutor said over and over again, that
6 link the blood and DNA of the victims to the defendant's
7 clothing, to his car and in his residence.

8 And regardless of how this case came out,
9 that is a huge distinction because the same effort was
10 made in this case to either find biological evidence of
11 the presence of the defendant at the scene, which the
12 State in its response to this motion says does not exist,
13 and to try and find evidence of the victim on the
14 defendant's person, on his clothing, and in his car and in
15 the places he said he went.

16 But unlike the OJ Simpson case, there is no
17 such evidence in this case and the Grand Jury was not told
18 that. That is an incomplete and misleading, unfair and
19 partial presentation and all of those things make it
20 subject to remand.

21 And when the case goes back, it is
22 critically important that the entire story of their
23 investigation, not just the parts they choose to present,
24 be given to the Grand Jury. Because the absence of
25 evidence at the crime scene is powerful, but the absence

1 of evidence where the defendant said he was and where he
2 went is equally powerful, because the State has agreed
3 that this was a bloody crime scene and that it would be
4 likely that the victim's blood and DNA would be on the
5 perpetrator. All they can say in response to the fact
6 that it's not is to start to speculate and say he must
7 have been wearing gloves. He must have been wearing
8 overalls. He must have burned things. Must have washed
9 things in such a successful way that he's eliminated all
10 the evidence. Those are not facts. Those are not
11 evidence. Those are not matters properly presented to the
12 Grand Jury.

13 It may also be those are things that the
14 Court will not consider in its ruling on the Simpson
15 hearing, but we are talking about the Grand Jury motion
16 and we are asking specifically for orders from this Court
17 to prevent the State from continuing what it is that they
18 seem to be doing, which is replacing actual evidence with
19 this kind of speculation.

20 In a similar vein, the shoe print and tire
21 track evidence that was presented to the Grand Jury was
22 incomplete and misleading. There is in this case as there
23 are in many forensic evidence cases, semantical
24 differences between the words used to describe the
25 comparative work done by scientists. This Court I am sure

1 is well familiar with the case law in that area. But it
2 is not appropriate for the Grand Jury to be presented as
3 lay people with confusing and over stated descriptive
4 words that to a lay person would clearly mean that the
5 State is suggesting there was a match between, for
6 example, his bicycle tire and tire prints near the scene.

7 There has to be a careful presentation
8 constrained by an order of this Court, I would suggest,
9 that uses the precise words that the forensic scientists
10 who look at this evidence actually used and the safest way
11 to do that is simply read to the Grand Jury the scientific
12 examination reports in which the criminalist said that the
13 tire patterns were similar, but that a more conclusive
14 association could not be made because of the poor quality
15 of the photographs and the lack of scale.

16 And contrary to something that was said in
17 open court during the Simpson hearing, the criminalist, as
18 we pointed out in our pleadings here, the base reference
19 to that actually said that for many of the same reasons,
20 they could not conclude that any of the photographs
21 submitted to them showed a flat tire in the bicycle, but
22 that has not seemed to stop the State from moving forward
23 with the idea that he had positively and conclusively
24 matched the tires on Mr. DeMocker's bicycle to these tire
25 prints and that further the tire prints themselves include

1 prints made by a flat rear tire on a bicycle.

2 That is not the evidence and the State knows
3 that. The State knows what the evidence is, because they
4 have given it to us. It's not ambiguous. It's not
5 unclear. It is simply unfair and inappropriate for the
6 State to mischaracterize the evidence that they know
7 exists in this case and that's a big piece of evidence
8 because that's the only piece of evidence that the State
9 has suggested ties Mr. DeMocker anyplace near the scene,
10 much less the residence.

11 The footprint evidence is perhaps even more
12 troubling and something that this Court needs to consider
13 and deal with on remand, which is -- and you remember in
14 the Simpson hearing, the State basically didn't go there
15 with the footprint evidence. They did with the Grand
16 Jury. Left the Grand Jury with the false impression that
17 there were footprints that must have been associated with
18 the defendant that led from where the bicycle tracks ended
19 to the residence and as Mr. Ainley talked about yesterday,
20 showed somebody milling around by the fence line and going
21 inside.

22 But the State knows perfectly well those
23 footprints do not match a single shoe of the defendant's.
24 They seized on January 3rd every pair of shoes that he
25 owned, including both pairs of bicycle shoes that he had

1 that left a very distinctive red mark because they had
2 clips on them and then in October when they arrested him,
3 they executed another set of search warrants that included
4 every shoe that he might have that they didn't get the
5 first time from every location that he had.

6 Now, in July, he did not have the apartment
7 in Scottsdale and the State and the police knew that. By
8 the time they arrested him in October, he had this
9 apartment and they went and took more shoes from
10 Scottsdale.

11 It is absolutely critical that on remand,
12 the truth of that matter be presented to the Grand Jury.
13 That there were footprints. They don't match the
14 defendant. And that is in its own way similar to the DNA
15 under the victim's fingerprints. Someone else made
16 footprints that the State originally thought incorrectly
17 were connected to the bicycle tracks and this crime, but
18 they're not made by the defendant's shoes and that is a
19 fact that just didn't get to the Grand Jury.

20 The golf club as a weapon and the head cover
21 story becomes a problem. The State has overstated and
22 mischaracterized as we pointed out pretty clearly in our
23 motion what Dr. Keen and what Dr. Fulginiti said about the
24 golf club and they have taken it to a whole other level by
25 saying not only was it a golf club, now, Ladies and

1 Gentlemen of the Grand Jury, it was this particular
2 left-handed Callaway golf club associated with this head
3 cover.

4 They did not tell the Grand Jury that
5 Dr. Fulginiti told them that it would be appropriate for
6 them to test other objects, to look for other kinds of
7 explanations for these matters. They overstated and
8 mischaracterize.

9 Dr. Keen did not say that it was a golf club
10 and he certainly did not say it was this golf club that
11 the State is speculating it was. The Grand Jury needs to
12 know that, because they are presenting a theory as we
13 talked about yesterday that is tied tightly to this
14 circular story about this head cover and this particular
15 golf club and its use by the defendant.

16 The indictment in this case says that a golf
17 club was used. It doesn't say club like or a weapon or
18 something with a shaft. It says a golf club. But the
19 State has made an unfair and biased presentation to the
20 Grand Jury and we're afraid they would do it again left
21 unchecked that it is this particular golf club. That is
22 not what their experts say and they're aware of that
23 because they have those reports because they gave them to
24 us.

25 The evidence that they presented about

1 financial fraud has been a big problem in this case. The
2 Court's read the Grand Jury transcript and read our motion
3 and the suggestion is twofold. That Mr. DeMocker killed
4 his former wife because he didn't want to pay her alimony
5 and he also killed her because he knew that she was going
6 to get him in trouble somehow over some unstated,
7 unspecified fraud. Whether it was tax fraud or fraud in
8 his divorce, we don't know and there is no support of
9 that.

10 The grand -- the grand jurors were told just
11 a couple of days before the presentation, Wallace and
12 Associates came forward with information the State had not
13 had time to look at yet, but it was bad and it was
14 evidence of fraud and it was thrown out there. Some of
15 the grand jurors had questions about that and that was --
16 those questions were essentially brushed off and the
17 inference was left hanging in the air.

18 Well, until yesterday it wasn't clear at all
19 to us what Wallace and Associates had to do with this
20 case. On Tuesday, we finally got the first meaningful
21 disclosure other than the tax returns prepared by Wallace
22 and Associates which came earlier, which was this letter
23 that you remember Ms. Wallace had that was not in
24 evidence, but she was looking at.

25 We interviewed her for the first time. What

1 she says and what she said in this letter, which
2 apparently was written about ten days ago is that Carol
3 Kennedy came to talk to her, complaining about a tax
4 issue. About the fact that she didn't think it was
5 appropriate for Mr. DeMocker to claim the alimony
6 deduction. The advice was he is allowed to claim some of
7 it, but we think he has claimed too much. You should file
8 your own return and let the IRS sort it out.

9 Ms. Wallace said truthfully on
10 cross-examination that's not fraud. That's just a tax
11 beef between taxpayers, each being represented by their
12 own professionals. The evidence also was that
13 Mr. DeMocker did what he did with advance notice to the
14 victim on the advice of an accountant. The accountant's
15 email to Ms. Kennedy well in advance of the return is in
16 evidence in the Simpson hearing as is the email from
17 Mr. DeMocker.

18 When this case goes back to the Grand Jury,
19 the Wallace and Associates evidence has to be, if
20 presented at all, presented truthfully and completely.
21 That Cynthia Wallace did not have and does not now have
22 any the evidence of fraud in this case.

23 I know from the disclosure that the State is
24 sending this report from Mr. Casalena to Griffith Rocky
25 Mountain Information Network who has talked about

1 preliminary impressions and asked for more documents, and
2 subpoenas are out. That investigation is ongoing and is
3 not been completed and has certainly not been disclosed to
4 us in its final form.

5 If the State intends to present evidence of
6 financial fraud, we ask that the evidence be presented in
7 a truthful and accurate and complete manner in context and
8 not in the way in which it was done in the reasonable
9 presentation which was throw it out and say we don't know
10 what it is, but it certainly doesn't look good for the
11 defendant.

12 There was a further, if you remember,
13 exchange between one of the grand jurors and the County
14 Attorney in which the grand juror professed to know what
15 that kind of information would do to Mr. DeMocker's
16 securities license. It turns out that information is
17 incorrect, but that information was left hanging out there
18 and was not corrected by the State.

19 It seems to us appropriate for the County
20 Attorney to have stepped in and said you need to decide
21 this case on the evidence presented, not what you think it
22 might mean or what might happen. But no effort was made
23 to correct that presentation. I think that is proof
24 positive, your Honor. The prejudicial effect of putting
25 out evidence in the manner in which it was presented on

1 financial fraud about which the State knew nothing at the
2 time. And to the extent that the State wants to present
3 other evidence, it needs to be mindful of its
4 responsibilities under the law and the rules.

5 The other points we make I think speak for
6 themselves, your Honor. The incorrect and misleading
7 suggestion that Mr. DeMocker was riding his bike across
8 the street is belied by Mr. DeMocker's detailed statements
9 to the police which were in evidence in the Simpson matter
10 which we pointed out to you in the Grand Jury pleadings
11 that he was actually riding miles away. He was across the
12 other side of Williamson Valley heading in the opposite
13 direction and that the police made a cursory and useless
14 effort to try and find his route because they were much
15 more interested in the bike prints they found at the end
16 of Glenshandra Road, leaving the ability to prove or
17 disprove Mr. DeMocker's alibi gone and the State continues
18 to say in court in front of you, your Honor, that
19 Mr. DeMocker has no alibi. Mr. DeMocker has an alibi the
20 State, the prosecutor and police didn't investigate. And
21 his ability to -- to promote that alibi was damaged
22 forever by that fact.

23 But in the context of the Grand Jury
24 proceedings, we say that when the case goes back to the
25 Grand Jury, what Mr. DeMocker said to the police needs to

1 be reported to the Grand Jury and they need to evaluate
2 whether that is an alibi or not. But to mistakenly say he
3 was riding across the street and to brush it off in the
4 manner they did was a violation of Rule 12.9.

5 Talking about escort services and multiple
6 girlfriends and statements which the detective has now
7 corrected under oath about how Mr. DeMocker was behaving
8 when he was talking to the police, that he made certain
9 statements about his need to wrap this up and go to bed
10 and get some rest, all of those -- all of those were
11 presented to the Grand Jury in a collectively prejudicial
12 and unfair way.

13 I think in this case, it's pretty obvious,
14 your Honor, as we work through the Simpson hearing, that
15 in some important respects, the evidence in this case as
16 it becomes more clear is -- is damaging to the State's
17 case. The DNA evidence as hard as they have tried to wrap
18 that up in a way that connects to their theory that
19 Mr. DeMocker is guilty has gone entirely the opposite
20 direction.

21 The DNA and other biological evidence as it
22 comes back points away from Mr. DeMocker completely and is
23 beginning to point to one or more strangers involved in
24 this case, and yet the State's response is very troubling
25 to us, which is when the evidence, particularly for

1 example the evidence of the DNA profile under her
2 fingernail is inconsistent with their theory, they just
3 ignore it. They just act as if it doesn't matter and
4 continue to plow ahead with their particular theory of
5 this case over top of that evidence. They have no way to
6 account for it in their theory and that is part of the
7 reason that we are so concerned about how this case is
8 presented the next time around if the State chooses to go
9 back to the Grand Jury.

10 The evidence of financial fraud has changed
11 again, and is not as the State advertised it at the
12 beginning of the case and I think the Court has in the
13 context of the Simpson hearing come to see that. That it
14 is -- it is altogether different than the State would
15 characterize it and is not the kind of matter that should
16 be just thrown out to the Grand Jury as if it is a fact
17 which is the way in which it was presented the first time.
18 The State is still searching. They are still issuing
19 subpoenas. They're retaining experts. They're beating
20 the bushes trying to find the case.

21 All of that would be just fine, your Honor,
22 were it not for the fact they arrested Mr. DeMocker nearly
23 three months ago and he has sat in jail ever since. That
24 is what is wrong with this case. Mr. Ainley sarcastically
25 referred to that as our claim that there was a rush to

1 judgment or justice in this case. That's a cliché and
2 whether it applies or not is not the point.

3 What is really the point as far as we're
4 concerned in this case, is that as this case moves on, it
5 becomes clearer and clearer to us that the case against
6 Mr. DeMocker is only circumstantial and that the State
7 understands that more clearly now than they did when they
8 went to the Grand Jury and more clearly than they did when
9 they began to suspect Mr. DeMocker minutes after they met
10 him in the early morning of July 3rd.

11 The case needs to be remanded for a new
12 finding of probable cause, and it needs to be done in a
13 way that guarantees Mr. DeMocker protection from what
14 happened to him the first time, because the consequences
15 to him, your Honor, are devastating. I don't need to
16 repeat the obvious, but beyond the fact of his loss of
17 freedom, the collateral damage to him and his family and
18 his reputation is immeasurable.

19 There is no way for a dismissal or an
20 acquittal or no bill from the Grand Jury to repair the
21 damage that has been done at this point. We need to be
22 sure as much as we possibly can under the rules that what
23 happened before is not repeated. We have proposed a way
24 in which that can be done if the State chooses to do it.
25 I would encourage the Court to remand this matter and to

1 give the State a reasonable period of time, but not more
2 than 30 days to make another presentation in this case, so
3 this matter is not lingering past the point of all reason.

4 The State has had six-and-a-half months now
5 to investigate this case and if they can't get a Grand
6 Jury to find probable cause this time around, it is not
7 for lack of trying. It is for lack of evidence.

8 Thank you.

9 THE COURT: See if I can get some agreement or
10 disagreement on observations about what the Court's
11 limitations are and its authority to direct the State to
12 proceed in a particular fashion.

13 First thing is one of the latter comments
14 made, Mr. Ainley, and then I will let you go forward with
15 what you wanted to present, but if a matter is remanded to
16 the Grand Jury, is it legitimate to put a time limitation
17 of some sort on it?

18 MR. AINLEY: I believe it is.

19 THE COURT: The other question, probably one that
20 you may have more issue with, is what about directives
21 from the Court with regard to presentation to the Grand
22 Jury? Are you aware of any case law in Arizona that
23 authorize that or elsewhere that might be persuasive for
24 an Arizona court with regard to the directives on a manner
25 of presentation?

1 MR. AINLEY: No, sir, and the idea that the Court
2 or even more laughable that the defense should detail what
3 evidence can be presented to the Grand Jury is like
4 letting the fox guard the hen house and say, well, you can
5 present evidence but don't -- don't present anything that
6 might be exculpatory. We want you to just present some of
7 this stuff over here because we don't think this stuff can
8 hurt us.

9 As Mr. Sears does correctly point out, the
10 prosecuting attorney who is presenting the case does, in
11 fact, work for the Grand Jury and is responsible for
12 presenting the case in a fair manner. But the defendant's
13 idea of what's fair and wanting to have an order that
14 certain evidence be presented in a certain way with
15 certain words and the State can't vary from that is
16 ludicrous.

17 THE COURT: If you are not aware of anything that
18 authorizes it, are you aware of anything that prohibits or
19 language from cases that may directly prohibit the Court
20 from that kind of intervention or order?

21 MR. AINLEY: I am not. And we will research it
22 and, again, this is one of those things where Mr. Sears
23 raises it at the last second without any notice to
24 anybody, so that there is no chance to research it
25 beforehand and present the Court with case law. Another

1 one of his --

2 THE COURT: Well, those are -- those are at least
3 considerations if the Court does remand, if you do find
4 something, either side, if you find something that
5 specifically authorizes or in candor to the court,
6 prohibits the court from entering orders that limit the
7 nature of the presentation, I would appreciate something
8 ASAP from you with regard to that.

9 MR. AINLEY: I do agree with Mr. Sears though,
10 Judge, that if the Court finds there was something that
11 was unfair about the presentation, that the Court should
12 specifically list what that is, because --

13 THE COURT: Oh, no doubt. No doubt.

14 MR. AINLEY: -- I'm terrible at trying to guess
15 what the Court was meaning at the time without some
16 guidance.

17 THE COURT: Right. But I see the Court's -- I
18 guess at this point, my -- my gut instinct is that I don't
19 think I have the authority to order the State to conduct a
20 particular method of presentation in a ruling on a motion
21 for new finding of probable cause. That's not to say that
22 I shouldn't make appropriate findings of fact and
23 conclusions of law. I think I do have an obligation to
24 specify, for the benefit of both sides, in particular if
25 there's a remand of what the concerns of the Court were in

1 finding that there was not a proper presentation the first
2 time. I think that's a necessary obligation of the Court.

3 MR. SEARS: Your Honor, I would add and I agree
4 with what you're saying and in part what Mr. Ainley is
5 saying.

6 My thought, and by the way, I made the
7 suggestion at the very end of my motion. It's not
8 something we thought of today. But I was hoping that the
9 State would welcome these kinds of directions because if
10 the State has an interest in doing justice, as I know it
11 does in this case, I would think that they would want a
12 clear road map to a proper and lawful proceeding, but if
13 the Court makes those findings, then the State ignores
14 them at its own peril. My only goal in doing that was to
15 short circuit the possibilities that inadvertently the
16 State does and we are back here again.

17 But we could live with a detailed order that
18 contained findings of fact and conclusions of law because
19 we trust that the State would take those very seriously
20 and make a presentation that didn't offend those. So
21 that's fine.

22 THE COURT: All right. If, as I say, you do come
23 up with something over the weekend and my intention
24 honestly is to take this matter under advisement also,
25 just so you're aware of that, and to work on it to some

1 extent over the weekend, and hopefully come up with a
2 decision as to the release and bonding issues sometime by
3 the middle of next week.

4 So, Mr. Ainley, sorry to interrupt your
5 presentation. What would you like to --

6 MR. AINLEY: Sir, the State believes the
7 presentation that was made to the Grand Jury was, in fact,
8 fair.

9 Defense counsel -- and I am going to go kind
10 of in reverse order here. At the end, because it hasn't
11 been up to this point, Judge, the defense refers to
12 testimony and exhibits that were presented during the
13 Simpson hearing, the State formally moves to incorporate
14 that testimony and the exhibits from the Simpson hearing
15 into this motion.

16 THE COURT: Any objection by the defense?

17 MR. SEARS: Oh, no. That's fine.

18 MR. AINLEY: Because --

19 THE COURT: I gathered that.

20 MR. AINLEY: Referring to this --

21 THE COURT: Both of you in the reply as well as
22 in the response were referring to things that commenced
23 being received by the Court in the other hearing, so I
24 appreciate a meeting of the minds on that and I will
25 consider any of the comments that were made in the no bond

1 hearing in connection with this motion, also.

2 Thank you.

3 MR. AINLEY: Defense counsel, one of the last
4 things said just recently, was the State presented
5 evidence concerning multiple girlfriends and an escort
6 service by used by Mr. DeMocker and yet it was the
7 defendant's own witness three days ago, Anna Young, who
8 talked about the defendant having multiple girlfriends and
9 telling his wife that he was -- his ex-wife that he was
10 sorry for those things, and also the escort service was
11 mentioned by her as well.

12 It was a term that was first used by
13 Mr. Casalena in his report when he was investigating waste
14 on the part of the defendant and she kind of laughed it
15 off and said, yes, he used that term and the State
16 explains in its motion that the basis for that, where
17 Mr. Casalena got it and where the State got it, was from
18 billing statements from the defendant's credit cards that
19 show that he was making payments to what was listed as an
20 escort service, and it was only upon further investigation
21 that the State found out that it was an outfit called
22 Great Expectations that apparently arranges dates for
23 people who can't find their own.

24 The -- mentions conduct by the defendant at
25 the scene. Conduct by (sic) a scene is always relevant,

1 Judge, and that was one of the basic things that first
2 drew their attention to Mr. DeMocker. That he was not
3 acting in a way that was consistent with somebody who was
4 upset that the mother of his children had just been
5 killed. That he was more concerned about going to work
6 the next day and, gee, I really don't have much time for
7 this. Can you move it on. That's always a big heads-up
8 for anybody who has a little bit of common sense or a lot
9 of experience in investigating homicides.

10 Defense complains that there was a grand
11 juror at Grand Jury who offered that he knew the
12 consequences of a fraud inquiry against a stockbroker, and
13 Mr. Sears says the prosecutor, and I was the prosecutor at
14 that time, should have cut the person off and, in fact, if
15 you look at that part of the transcript -- text of the
16 Grand Jury presentation, in fact, I told the guy you can't
17 say anything. This is your opportunity to ask questions
18 of this witness. Do not say anything. And I did, in
19 fact, cut off that individual.

20 He complains about Wallace and Associates
21 and did not inquire about -- oh, Ms. -- says that the
22 disagreement over the income tax return did not account to
23 fraud, but she -- Ms. Wallace also told the Court
24 yesterday that it was Ms. Kennedy who was making the
25 allegations of fraud in addition to also Mr. Casalena in

1 his report making the same allegations. But that
2 Ms. Wallace did not inquire further about the fraud,
3 because she was trying to deal only with the taxes at that
4 point in time and tried to cut the defendant -- I'm
5 sorry -- the victim off and didn't ask her about the fraud
6 to find out what -- if it was something more than what --
7 more than the deductions listed in the income tax return.

8 Defense counsel says, well, gee, Judge, it's
9 just speculation about these overalls and gloves. Well,
10 that's because, Judge, what lawyers say during closing
11 argument is not evidence, but it is helpful for the Court
12 or the jury to understand the evidence and to explain the
13 evidence, it's not a real big leap to figure out that if
14 you wear gloves, you don't -- look, you don't leave
15 fingerprints or the explanation for why there was not
16 biological evidence located at the scene.

17 Mr. Sears had suggested, well, gee, maybe
18 this was a sex assault that was interrupted or a burglary
19 that was interrupted and yet the lack of biological
20 evidence cuts against that and says this wasn't just a
21 random act of violence. This was something that was well
22 prepared for, well planned and it's easy to do things so
23 that you won't leave biological evidence, and the State
24 listed some -- some commonly known ways to not leave
25 fingerprints and to not have blood all over your bicycle

1 clothes and to not leave shoe prints that are consistent
2 with the bicycle clips that you wear. You just change
3 your shoes. That's not a big shock to anybody.

4 Defense counsel complains that there was no
5 presentation about DNA. There was a full presentation of
6 the DNA as it was known at that time with Detective Brown
7 when he took the stand. They say, well, but since then we
8 have learned something else and so it wasn't fair at the
9 time, Judge. Well, the standard is, was it known at the
10 time of the presentation, not what was subsequently known
11 and that is a misstatement of the burden on the State at
12 the time of the presentation. You can't present something
13 and say, well, this is what we know at this point, but
14 that might change later. So just take it with a grain of
15 salt right now. The State was presenting the evidence as
16 they knew it at that point in time.

17 DNA under the fingernail, that was fully
18 explored with Detective Brown during the Grand Jury
19 presentation.

20 Let's go over here to the actual motion. It
21 starts off again with the DNA. That was all covered with
22 Detective Brown. Exculpatory shoe evidence. He said,
23 well, they weren't able to match any shoe that they took.
24 Well, it's not a real big leap to figure out that he
25 probably got rid of the pair of shoes because it's going

1 to be covered with blood.

2 Misleading testimony regarding tire track
3 comparison. The -- the Court has diagrams or photographs
4 of the tires and of the tire prints that were marked as
5 exhibits during the Simpson hearing or non-bondable
6 hearing and the Court can certainly take a look at those
7 to see whether they are similar or consistent and the
8 presentation was, in fact, accurate and it was the opinion
9 of officers at the scene when they pressed down on the
10 bike and it was a flat tire, that it was consistent or
11 similar to the bicycle tracks that they were looking at.

12 THE COURT: Is there a difference between the use
13 of the words similar and consistent in terms of lab
14 parlance versus members of the public and common parlance?

15 MR. AINLEY: Well, unless we're going to explain
16 lab parlance to the Grand Jury, I don't believe that there
17 is and if you look in a thesaurus for consistent, you will
18 find the word similar in the same definition.

19 So Grand Jury presentations are often, if
20 you will excuse the phrase, dumbed down to the level of
21 the common person who is coming in whose experience is
22 with watching CSI on TV, but little else.

23 Misleading evidence regarding the source of
24 victim's injuries and irrelevant evidence regarding a golf
25 club head cover requires remand. The golf head covers, in

1 fact, are very relevant information, Judge, and, in fact,
2 its location was not even known at the time because it was
3 sitting over in Mr. Sears' office at the time. But that
4 testimony was, in fact, very relevant. That the defendant
5 took the golf head cover and got rid of it, even before
6 the officers knew the significance of it, and came back
7 looking for it. So that is not irrelevant. It is not
8 misleading information, and certainly if this case were to
9 be remanded, where that golf head cover ended up and what
10 Mr. DeMocker said about it during his arrest would
11 certainly need to be presented to the Grand Jury.

12 Testimony regarding prior support to the
13 victim requires remand. Complains that the officer didn't
14 know exactly how much the prior support was, but the
15 officer says -- tells them he was supporting her up to
16 that point in time, but wasn't sure exactly what the
17 dollar amount was. I fail to see how that is prejudicial
18 to the defendant when the officer says, yes, he was
19 supporting her. She was making a minimal amount of money.
20 But he doesn't know what the actual dollar amount was.

21 The detective also failed to mention the
22 victim actually owed money. Actually if you take a look
23 at the Grand Jury transcript, Judge, there is a mention
24 that he had complained that the victim owed him money and
25 she was complaining that he owed her money.

1 Complains there were allegations that
2 Mr. DeMocker was defrauding reference taxes. You heard
3 the testimony of Ms. Wallace yesterday, which fully
4 supports that statement by the officers to the Grand Jury
5 that there were, in fact, allegations that he was
6 defrauding based on his taxes from Ms. Kennedy at the time
7 that Ms. Wallace didn't go into any further what other
8 fraud she might have known about.

9 False testimony regarding DeMocker's
10 statements regarding his bicycle ride require remand.
11 Complains that the detective made a false statement
12 because he was riding his bike across the street from the
13 victim's neighborhood, and the officer estimated it at
14 roughly 1.5 miles, and yet it was the defendant's own
15 exhibit, Exhibit 66, which is the poster of the street map
16 that shows that the location where Mr. DeMocker parked his
17 car is roughly less than one mile and across the highway
18 from the victim's neighborhood.

19 The fact that he says well, gee, but the
20 defendant veered -- was driving -- riding in the opposite
21 direction. Well, they didn't ask about that. He didn't
22 tell them that he said that he was riding in the opposite
23 direction and the tire marks show that he actually crossed
24 the street and was over on Glenshandra and then cut
25 through the woods back behind the house.

1 Misleading information about Mr. DeMocker's
2 statements on learning the victim's death require remand.
3 The officer corrected the statement that he made during
4 the testimony, but he also testified about the -- that it
5 was a different statement that dealt with having to get
6 back to work the next day, and was not unfair or unduly
7 prejudicial.

8 Remand is required because unsupported
9 theories were presented to the Grand Jury as facts. The
10 victim's defensive wounds were on her right side and he
11 complained that -- that does not support a conclusion of a
12 left-handed person striking the individual. Well, pretty
13 much common sense. It doesn't take a rocket scientist to
14 figure that out, and certainly is not unduly prejudicial
15 to point that out.

16 The severity of injury suggests a person
17 showing rage. That is not an unsupported speculation,
18 Judge. That's common sense that a person who is hit in
19 the head seven times with a golf club and their skull is
20 shattered into 50 pieces, that wasn't just a little love
21 tap to knock them unconscious so that somebody could make
22 an escape. This is somebody who wanted to make sure that
23 this person didn't ever get up. And rage does, in fact,
24 suggest that the victim and the attacker know each other.

25 Page 18, number seven. Despite

1 acknowledging that the forensic accounting was incomplete
2 and that the department was still going through records,
3 Detective McDormett testified that our understanding is
4 that Mr. DeMocker was in debt. Testimony of Anna Young
5 three days ago, defendant owned -- had equity in two cars
6 and a retirement account with \$197,000 I believe is what
7 was testified to. And the Bridle Path house was
8 mortgaged. Had two mortgages on it. Was upside down.
9 Mortgaged to the hilt. Had no equity in it. That the
10 defendant was in debt up to his -- into his eye balls and
11 somehow that's misleading to say he was in debt when his
12 own attorney says that he was in debt.

13 Incorrect information about Mr. DeMocker's
14 Miranda rights require remand. The officer said that he
15 wasn't sure whether Mr. DeMocker was read his Miranda
16 rights when he was interviewed on the night of the
17 victim's death. He wasn't sure at that point in time.
18 But it says Mr. DeMocker was not read his Miranda rights,
19 but Miranda is a fifth amendment issue, not a probable
20 cause issue, and it's beyond the scope of Grand Jury
21 presentation proceedings.

22 Misleading information about the victim's
23 associates requires remand. Complained they weren't told
24 that she had had prior boyfriends. I am not seeing any
25 relevance there. The person she was in a relationship

1 with at that point in time was in Maine. Do we have to go
2 back to the fifth grade to list everybody she has ever had
3 any sort of relationship with?

4 False information about Mr. DeMocker's date
5 of arrest requires remand. The detective talked about
6 that and said it was not his belief that he misstated that
7 date and he believes that is a transcription error by the
8 Court Reporter. He said he might have misstated the date,
9 but he does not believe that he gave the date of the
10 arrest incorrectly.

11 The State's repeated presentation of
12 irrelevant and prejudicial testimony requires a remand for
13 a new finding of probable cause. Well, this is the same
14 come back to the end. Several girlfriends. The escort
15 service. But that was part of the presentation concerning
16 Mr. DeMocker's extravagant life-style. Ms. Young herself
17 testified he certainly was not frugal. That he was
18 spending money for girlfriends and for -- that the days at
19 the Phoenician and things like that, and she was very kind
20 in her assessment of Mr. DeMocker's life-style.

21 And she was the one who mentioned it was
22 Mr. Casalena who first noted that it was billed as an
23 escort service and considered it to be a waste on the part
24 of the defendant towards the community property.

25 All in all, Judge, the defendant's motion to

1 remand is without basis. It is based on misstatements of
2 the evidence that was presented to the Grand Jury the --
3 an attempt to down play evidence that is, in fact,
4 relevant and important and to attempt to dictate to the
5 State exactly what evidence it can present if this -- if
6 this Court were to remand it to minimize the impact of
7 relevant evidence and its presentation to the Grand Jury
8 in a fair and impartial way and taken as a whole, Judge,
9 the presentation was fair. It was impartial. It was --
10 it was everything that is required under the rules and
11 this matter should not be remanded back to Grand Jury.

12 THE COURT: Even if it's true, what's the
13 reference to the -- having girlfriends, having an escort
14 or dating service, what's the purpose of that if it's not
15 to color the defendant in a particular negative way?

16 MR. AINLEY: Exactly what Anna Young said, Judge.
17 He was leading an extravagant life-style. Girlfriends are
18 expensive. Been a long time since I had a girlfriend, but
19 as I remember, they are rather expensive and when you're
20 treating them to the Phoenician, they get even more
21 expensive real fast.

22 And paying for dating services, you're
23 expected to put out a certain amount of cash to show
24 interest and the defendant wasn't staying home reading
25 books at night. He was -- well maybe he was. The ones on

1 how to flee the country. But he was out on the town
2 spending the money that he didn't have because he didn't
3 have any equity in anything. It was all cash flow that he
4 was making on a daily or weekly basis from the company
5 that he was working for.

6 THE COURT: Thank you.

7 Mr. Sears, any closing comments?

8 MR. SEARS: I do, your Honor. I have a couple of
9 points to emphasize here.

10 In the Trebus case, which is 189 Arizona
11 621, the Trebus court said our statutes and rules give the
12 Grand Jury, not the prosecutor, the right and obligation
13 to decide whether to hear a defendant or exculpatory
14 evidence. We therefore see nothing odd in requiring the
15 prosecutor to tell the Grand Jury about possible
16 exculpatory evidence.

17 Now, I don't think that means -- I don't
18 think that necessarily rises to the level of saying that
19 the Court can direct specific exculpatory evidence
20 necessarily, what the Court was concerned with earlier,
21 but I do think it's important because it underscores the
22 role of the prosecutor which I continue to hear from the
23 State differently than I think it really is.

24 Mr. Ainley has suggested that somehow you
25 have to look at the presentation and decide whether as a

1 whole it's relevant and generally fair. Grand Jury
2 proceedings are unique in that there is a transcript and
3 12.9 motions are governed and bound by the transcript of
4 those proceedings, and so they are the best evidence of
5 what the Grand Jury heard and did not hear in a very
6 powerful way, and I found a couple of instances looking at
7 page 16 of my original motion when we were talking about
8 our belief that Detective McDormett testified falsely when
9 he was trying to describe what kind of state the body was
10 in and the rest of that, that Detective McDormett has
11 backed off from now in the Simpson proceeding. But this
12 is an example of what concerns us.

13 At line ten of my motion, Mr. Ainley
14 persisted with this line of questioning by gratuitously
15 commenting that it, quote, could have been a heart attack,
16 could have been a stroke. Could have been anything and
17 yet he is concerned about the condition of the body.
18 That's at page 53 lines 14 through 16 of the Grand Jury
19 transcript and then Detective McDormett was cued by that
20 and said that he found it odd that a person would ask that
21 about the condition of the body speculating that is how
22 detectives, medical personnel talk and not usually
23 relatives.

24 In my mind, Judge, that's an example of the
25 prosecutor losing sight of his role and becoming

1 essentially in this case the 14th grand juror, and acting
2 as a witness and a presenter of evidence at the same time
3 and encouraging essentially the detective to do the same
4 thing.

5 And we are hearing more of that even today,
6 that somehow the State thinks in this case they can take
7 things out of context, misleading things, and as long as
8 they think there is some basis for it, present it to the
9 Grand Jury.

10 I think that just misses the point, your
11 Honor. The point of our motion and I think the enormous
12 weight of the law behind that is that the Grand Jury is an
13 independent body and the power of the prosecutor is
14 significant and has limits because it is so significant.
15 And when the prosecutor oversteps and goes outside the
16 rules, the potential for abuse of the Grand Jury system is
17 pretty obvious in this case.

18 And that is our concern that the State still
19 doesn't understand that presenting incomplete and
20 misleading and materially false testimony, even if other
21 parts of the presentation are fair and impartial, taints
22 the whole process, because you can never be sure what it
23 is about the Grand Jury presentation that causes a grand
24 juror to vote to indict in the case.

25 And so all of the presentation, not just

1 parts of it, have to be fair and impartial.

2 Mr. Ainley suggested that when the grand
3 juror was asking questions about the impact of fraud on
4 Mr. DeMocker's license, he corrected him. That's true,
5 but this is what he actually said. Page 67 of the Grand
6 Jury transcript, line 14. Mr. Ainley: Detective, this --
7 you may not be able to answer this, but if you are a
8 financial adviser and you're accused of fraud, what does
9 that do to your career?

10 Answer: I don't know.

11 Mr. O'Donnell was a juror. I can answer
12 that.

13 Mr. Ainley: Okay.

14 Mr. O'Donnell: It would ruin your U4.

15 Mr. Ainley: I'm sorry, sir. You can't
16 testify in this proceeding. It's time to ask factual
17 questions of this officer. I wasn't sure he could answer
18 this at all.

19 That's only part of what Mr. Ainley needs to
20 do. He has an affirmative duty under the case law to
21 correct false and misleading testimony and he had
22 affirmatively a duty not only to stop the grand juror from
23 asking the question, but to advise the Grand Jury not to
24 consider that because it's not evidence in the case, but
25 now it's out there and the grand jurors now have an

1 additional piece of evidence from this witness, which by
2 the way is completely wrong. It just doesn't affect
3 Mr. DeMocker's U4. Mr. DeMocker has been arrested and
4 charged with murder and he still has a U4 and he still has
5 a job.

6 But this is just I think one example of the
7 way in which this presentation was so skewed by the
8 blurring of responsibilities and roles between the
9 prosecutor and the Grand Jury that when you take all the
10 points that we have made and you take the way in which
11 they were presented and the efforts to mislead and to
12 smear Mr. DeMocker for no evidentiary purpose, the net
13 effect of it, if you want to use Mr. Ainley's model for
14 analytical purposes, the net effect was this presentation
15 was unfair and it was partial and it was biased.

16 The financial fraud evidence was thrown out
17 there in an irresponsible way we think. While they said
18 they didn't know what it was, it didn't stop them from
19 telling the Grand Jury that they had evidence of tax
20 cheating even though the truth was they had had that
21 evidence for four months. The record and materials that
22 they claimed were newly discovered to them, the record
23 shows otherwise. It shows these are documents that were
24 seized within 24 hours after this murder.

25 You know, the, I guess, the principle

1 concern that we have with regard to the presentation in
2 this case and the future presentation is something that
3 still seems to confuse Mr. Ainley. I thought I had
4 explained pretty clearly that the reason that I thought
5 the Simpson proceeding and subsequent evidence was
6 relevant was not because it affected what the State knew
7 at the time of the proceeding. I agree completely with
8 Mr. Ainley that the focus of the 12.9 motion is what the
9 evidence -- the state of the evidence was.

10 What I was suggesting was that for purposes
11 of the next presentation, we now know a great deal more
12 about the evidence, so that when the next presentation is
13 made, it can't be made based on what the evidence was on
14 the date the case was first taken to the Grand Jury. It
15 must be based on what we know now and we know so much more
16 now about some of these same things, but what we said in
17 our motion is still true.

18 The DNA evidence was misleading and false
19 when it was made. It is not simply that we know more
20 about it now. We have made a case which I think is a
21 strong case that based on what the State knew or should
22 have known at the time, the presentation they made was
23 incomplete, misleading and false and requires remand.

24 But we also know for sure that when they go
25 back to the Grand Jury the next time, there is even more

1 exculpatory evidence that they need to tell the Grand Jury
2 about on that DNA that we know about now that neither the
3 State nor I knew about at the time of the first
4 presentation. That was the point I was trying to make. I
5 hope it isn't lost on the Court as it was on Mr. Ainley.

6 THE COURT: I'm glad for the clarification. I
7 agree with Mr. Ainley and with your most recent analysis,
8 that we can't hold the State's standard to what is known
9 now versus what was known then. I think that where you
10 all agreed on from what I was able to look at for purposes
11 of this motion and the Simpson hearing was the things
12 that, for instance, Detective McDormett explained out of
13 Exhibit Number 2 for that hearing, the Grand Jury
14 transcript where he made points about -- made corrections
15 to what he had previously said, and so -- so I understand
16 that and I appreciate the clarification, and I think both
17 sides are in agreement with regard to that.

18 Thank you both. Let me see if I had any --
19 any additional questions before I let you go. I don't
20 think I do.

21 So I will take the matter under advisement
22 and, again, try to provide you with a ruling by hopefully
23 next Wednesday.

24 MR. SEARS: Thank you, your Honor.

25 THE COURT: Stand in recess on this matter.

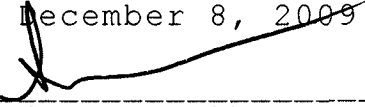
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C E R T I F I C A T E

I, SANDRA K MARKHAM, Certified Reporter, do hereby certify that the foregoing pages constitute a true and accurate transcript of the proceedings had and testimony given in the hearing of the matter entitled as upon the first page hereof.

Dated: December 8, 2009.



Sandra K Markham, CR, RPR, CSR
Certified Reporter
Arizona License No. 50001